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The Rule Against Perpetuities-The Implication of a Reasonable Tune for the Performance of a Contingency to the Vesting of Future Interests in Commercial Transactions-Maryland's Hybrid Approach to theRule Against Perpetuities in Commercial Contexts

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COMMENTS

The Rule Against Perpetuities—The Implication of a Reasonable Time for the Performance of a Contingency to the Vesting of Future Interests in Commercial Transactions—Maryland's Hybrid Approach to the Rule Against Perpetuities in Commercial Contexts

I. Introduction

This comment will discuss the application of the Rule Against Perpetuities ("the Rule") to commercial transactions. After examining methods by which other courts have carved out exceptions to the Rule for commercial transactions or have read certain implications into commercial transactions to save them from violating the Rule, it examines the way in which Maryland has dealt with commercial transactions under the Rule. Maryland takes a hybrid approach to saving interests from the Rule, by which it implies a reasonable time only when parties to a contract creating a future interest can affect the interest's vesting, but refuses to imply a reasonable time when a contingency to an interest's vesting is controlled by a third party.

Such a hybrid approach leads to confusion because it is not clear to what extent a party obligates itself to assure a contin-

gency's satisfaction and when a contingency will be held to be controlled by third parties. The better approach for Maryland to take would be to imply a reasonable time for an interest's vesting into all commercial transactions, regardless of who controls the contingency. By doing so, Maryland would join other jurisdictions that have followed the lead of California in *Wong v. DiGrazia*.[1] Those jurisdictions recognize that the social utility of permitting certain commercial transactions outweighs the policies protected by the Rule. Such a rule would be in accord with other Maryland cases on the Rule and reduce the complexity of an already tangled web of law on the subject.

Part II will briefly highlight the mechanics of the Rule Against Perpetuities as well as discuss modern reforms to the Rule such as the doctrines of wait and see and *cy pres* reformation of interests that would otherwise violate the Rule. In part III, the methods by which courts in other jurisdictions have made allowances for commercial transactions under the Rule will be compared to Maryland's approach.

II. Background

Part of the common law tradition for centuries,[2] the Rule Against Perpetuities has long vexed students and practitioners with its intricacies. Indeed the complexities of the Rule have led some writers to call for its abolition[3] and has even prompted a court to hold that lack of familiarity with the Rule is an insufficient basis upon which to find a lawyer incompetent.[4] It is beyond the scope

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1. 386 P.2d 817 (Cal. 1963) (en banc).

2. The Rule Against Perpetuities first appeared in 1681 in The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681).

3. *See* G. Graham Waite, *Let's Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93 (1993).

4. In the case of *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (en banc), intended beneficiaries of a will sued the attorney who drafted it after the will was found to be void under the Rule. In denying the plaintiffs' claims against the attorney for malpractice and as third party beneficiaries of the contract between the drafting attorney and testator, the California Supreme Court held that it was not negligence or breach of contract for the attorney to fail to effectuate the testator's wishes. *See id.* at 690. The court echoed the words of John Chipman Gray that:

> "There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. . . . A long list might be formed of the demonstrable blunders with regard to its questions by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills

of this comment to attempt to provide its readers with a full description of the workings of the Rule.[5] A brief description, however, of the basic mechanics of the Rule is useful for a fuller understanding of this topic.

The Rule Against Perpetuities invalidates interests which have the possibility, however slight, of vesting more than twenty-one years, plus gestation periods if applicable, after all lives in being at the time of the interest's creation. Originally applied more than 310 years ago in *The Duke of Norfolk's Case*,[6] the Rule was classically restated by John Chipman Gray as: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[7] The Rule Against Perpetuities developed as a reaction to attempts in feudal England to keep land within families.[8] Although often confused with the rule against unreasonable restraints on the alienation of

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> and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it."

Id. (quoting JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES xi (4th ed. 1942)). The court went on to hold:

> In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by [the attorney] in preparing the instrument, it would not be proper to hold that [the attorney] failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.

Id.

5. Harvard Law School professor W. Barton Leach authored several articles discussing the Rule, two of which purport to provide a student of the Rule with instruction on its workings. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965) [hereinafter Leach, *The Nutshell Revisited*]. A more recent article details the Rule, taking into account recent reforms to the Rule such as "wait and see" and "*cy pres*." *See* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1567 (1986). Both Leach's and Dukeminier's articles are instructive to those unfamiliar with or in need of a refresher on the Rule.

6. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681). For an informative discussion of the turbulent history surrounding *The Duke of Norfolk's Case*, see Herbert Barry, *The Duke of Norfolk's Case*, 23 VA. L. REV. 538 (1937).

7. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (Roland Gray ed., 4th ed. 1942). Although the fourth edition of Gray's classic treatise on the Rule was published in 1942, the fourth edition of the text remains largely unchanged from its original form when first published in 1886. *See* W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, n.3 (1960).

8. *See* THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND & FUTURE INTERESTS 178-80 (2d ed. 1984).

land,[9] it is a rule that primarily guards against the remote vesting of future interests.

A. The Basic Mechanics of the Rule Against Perpetuities

Generally, the Rule declares void *ab initio* interests that are not vested upon their creation and that need not necessarily vest or fail within the Rule's measuring period. The measuring period of the Rule is lives in being[10] at the creation of the interest plus twenty-one years.[11] Where the parties to the instrument creating the interest are both corporations and the instrument makes no reference to measuring lives, the measuring period is merely twenty-one years.[12]

In analyzing an interest under the Rule, it is first necessary to determine whether the interest is subject to the Rule's application. Only if an interest is subject to the Rule is it necessary to determine whether the interest has the possibility of vesting too remotely. To make this determination, an interest is judged prospectively from the time of the interest's creation, traditionally without regard to events that occur after the interest's creation.[13] As explained by W. Barton Leach,

> A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities. Probability

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9. Although both the Rule Against Perpetuities and the rule against unreasonable restraints on alienation have the same goal, to keep property alienable, they accomplish this goal by different means. "The rule against unreasonable restraints on alienation is directed primarily against attempts to make vested interests, present or future, inalienable." 6 AMERICAN LAW OF PROPERTY § 26.2, at 411-12 (1952).

10. A life in being is defined as "the remaining duration of the life of a person who is in existence at the time when the deed or will takes effect." BLACK'S LAW DICTIONARY 924 (6th ed. 1990).

11. *See* GRAY, *supra* note 7. The period of 21 years was initially developed "to cover the time necessary for the birth of posthumous children, and also the minority of an executory devisee unborn at the death of the testator." *Id.* § 171, at 163. The 21-year period was first added only in cases of actually minority, but later became a period in gross. *See* 3 LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1215, at 99 (2d ed. 1956). Note that most versions of the Rule provide for a gestation period to account for cases of posthumous birth where such gestation actually occurs. *See* 3 *id.* § 1224, at 112.

12. *See* Fitchie v. Brown, 211 U.S. 321, 334 (1908); Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799, 806 (N.Y. 1996); Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1144 n.7 (Md. 1988); United Va. Bank v. Union Oil Co., 197 S.E.2d 174, 177 (Va. 1973). Because corporations may conceivably exist forever, the concept of measuring lives is inappropriate to transactions among corporate parties.

13. *See* Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 155 A.2d 702, 705 (Md. 1959).

> of vesting, however great, is not sufficient. Moreover, the certainty of vesting must have existed at the time when the instrument took effect . . . . It is immaterial that the contingencies actually do occur within the permissible period or actually have occurred when the validity of the instrument is first litigated.[14]

Quite obviously, the possibility of an interest vesting *later* than the perpetuities period removes the absolute certainty of that interest vesting *within* the perpetuities period.

As stated above, interests that are vested upon their creation are exempt from application of the Rule.[15] Such vested interests include reversions,[16] absolutely vested remainders, and vested remainders subject to complete divestment.[17] Also exempt from the Rule are possibilities of reverter[18] and rights of entry.[19]

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14. Leach, *Perpetuities in a Nutshell*, *supra* note 5, at 642-43. Note however that this traditional analysis has been altered by jurisdictions which have adopted the "wait and see" approach to perpetuities. *See infra* Part II.B.1.

15. *See* GRAY, *supra* note 7, § 201, at 191.

16. Maryland courts define a reversion as

> any reversionary interest which is not subject to a condition precedent. It is the residue of an estate left in the testator to commence in possession after the determination of some particular estate devised by him. Hence, a reversion arises whenever the owner of real estate devises or conveys an interest in it less than his own.

Ringgold v. Carvel, 76 A.2d 327, 332 (Md. 1950) (citation omitted).

17. *See* 3 SIMES & SMITH, *supra* note 11, § 1235, at 140. Distinguishing between contingent remainders and vested remainders, the Maryland Court of Appeals explained that

> a contingent remainder is one which is either limited to a person not in being or not certain or ascertained, or so limited to a certain person that his right to the estate depends upon some contingent event in the future. But when . . . the remainderman is then ascertainable, the remainder immediately becomes vested, for a vested remainder is one which is limited to a person in being, whose right to the estate does not depend upon the happening or failure of any future event.

Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A.2d 906, 909 (Md. 1943). Remainders may be considered vested although subject to divestment upon a condition subsequent. *See id.*

18. The Maryland Court of Appeals has set forth the following definition of a possibility of reverter:

> A possibility of reverter is any reversionary interest which is subject to a condition precedent. When the owner of an estate in fee simple absolute transfers an estate in fee simple determinable, the transferor has a possibility of reverter. In other words, if one who has an estate in fee simple creates a determinable fee in another, he has thereafter merely a possibility of reobtaining the land by reason of the occurrence of the indicated contingency.

Ringgold, 76 A.2d at 332 (citation omitted).

19. Both of these interests are not vested, but are exempt from the Rule more from historical accident than from their effects on the use of land subject to them. It is said that

Included, then, within the Rule's ambit are contingent remainders[20] and executory interests.[21] Of these, executory interests arise most often in the commercial transactions discussed herein.[22]

Three types of interests traditionally subject to the Rule Against Perpetuities commonly arise in commercial transactions: options, preemptive rights and leases to commence in the future. Both options and preemptive rights can be described as executory interests, as they act to cut short the estate of the owner of a present interest prior to the estate's natural termination.[23] Options give to their holders the power to force a conveyance of a parcel of property to them for a specified consideration. Preemptive rights allow their holder the right of first refusal when the property they limit is offered for sale by the owner of the

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in the "ad hoc" development of the Rule these interests "just didn't get caught in the net." BERGIN & HASKELL, *supra* note 8, at 179, 204. *See* 3 SIMES & SMITH, *supra* note 11, §§ 1238-39, at 144-48; W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 739-41 (1952).

Despite being exempt from the Rule, these interests may be subject to other restrictions. Many jurisdictions limit the duration of possibilities of reverter and rights of entry. *See, e.g.*, MD. CODE ANN., REAL PROP. § 6-101(b) (Michie, WESTLAW through 1996 Reg. Sess.) (limiting the life of such interests created on or after July 1, 1969 to thirty years). Other jurisdictions require under marketable title acts that the interests be rerecorded periodically to remain valid. *See, e.g.*, UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 3-409 (amended 1990), 14 U.L.A. 301 (1990). *See also* MD. CODE ANN., REAL PROP. § 6-102 (Michie, WESTLAW through 1996 Reg. Sess.) (requiring a "notice to preserve" to be periodically recorded to avoid extinguishment of interests created before July 1, 1969).

20. *See* 3 SIMES & SMITH, *supra* note 11, § 1237, at 142-44. Maryland defines the essential characteristics of an executory interest as follows:

> First, on the happening of a condition or event, an estate vests in the holder of the executory interest, and it is not vested until that time. So long as it remains a future interest it is non-vested. Second, it must vest in some person other than the creator of the executory interest. Third, with the exception of the executory interest after the determinable fee and the fee simple conditional, it vests in derogation of a vested freehold estate and not at the termination of a freehold estate. Fourth, on the happening of the condition or event, it may become a present interest automatically; no entry or election being necessary.

Boyd v. Boyd, 332 A.2d 328, 334 (Md. Ct. Spec. App. 1975) (quoting 1 SIMES & SMITH, *supra* note 11, § 221, at 249).

21. *See* 3 SIMES & SMITH, *supra* note 11, § 1236, at 140.

22. Contingent remainders arise only from devises or conveyances of life estates where the testator or grantor provides for the transfer of the remainder interest following the life estate to a person or class of persons whose identity is not certain until the occurrence of some contingency. *See* 1 SIMES & SMITH, *supra* note 11, § 103, at 81-82. Such conveyances typically arise from the devise or bequest of property; but they are infrequently, if ever, encountered in commercial transactions.

23. *See* 2A POWELL, POWELL ON REAL PROPERTY ¶ 272[1a], at 38 (1995) (defining executory interests).

present interest.[24] Leases to commence in the future have the same effect for the purposes of the Rule as do executory interests.[25] Under a traditional analysis, all of these interests would violate the Rule Against Perpetuities if their vesting were to be temporally unrestricted.

B. Modern Reforms to the Rule Against Perpetuities

In the early twentieth century, the "remorseless" application of the Rule Against Perpetuities[26] began to be criticized by scholars for results that they deemed absurd.[27] Prominent for such criticism was Professor W. Barton Leach of Harvard Law School, whose prolific writings[28] shaped the modern form of the American Rule Against Perpetuities throughout the middle of this century. Leach, in a 1952 article, attacked the Rule as too mechanistic, calling for reform of the Rule's application.[29] Reforms to the Rule took place soon after when State legislatures

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24. "[A] right of first refusal to purchase property is commonly known as a 'preemptive right.' It is an interest in property, and not merely a contractual right, whereby the preemptioner acquires an equitable right in the property, which vests only when the property owner decides to sell." Ayers v. Townsend, 598 A.2d 470, 474 (Md. 1991).

25. A lease to commence in the future is an interest that is not vested upon its creation but can only become vested upon the tenant's entry into possession of the leasehold estate. Gray, in his treatise on the Rule, in explaining which interests are vested upon their creation, stated "[t]hus: . . . (2) Rights less than ownership in land of others to begin *in futuro* are not vested until they begin." GRAY, *supra* note 7, § 114, at 107-08. A right to a leasehold interest that begins in the future is such a right as it purports to give to the grantee only the future right to a *limited* estate in land, not a fee simple estate. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *317 (defining a lease as a conveyance of land "always for a *less* time than the lessor hath in the premises").

26. GRAY, *supra* note 7, § 629, at 599. Gray said that after the instrument creating a future interest was construed so as to effectuate the intent of the testator, the Rule should then be applied remorselessly. *See id.*

27. Familiar to students of the Rule are the classic examples of "the fertile octogenarian," "the unborn widow," and "the slothful executor," in which interests are voided because (respectively) an elderly gentleman is presumed to be fertile, a testator's bequest to another person's "widow" is held to not necessarily refer to a woman living at the time of the interest's creation, or an executor's administration of an estate is presumed to take longer than twenty-one years after the death of all lives in being at the time of the interest's creation. Representative cases of these examples are: Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787); Perkins v. Iglehart, 39 A.2d 672 (Md. 1944). Professor Leach criticized these holdings in his article calling for reform of the Rule. *See* Leach, *supra* note 19, 731-34 (1952).

28. In addition to the several works of Leach cited *supra* notes 5, 7, and 19, Leach also authored W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960).

29. *See* Leach, *supra* note 19, at 745-49.

enacted "wait and see" statutes and courts began to use *cy pres* to reform interests that on their face violated the Rule.

1. Wait and See.—The "wait and see" method of analyzing interests subject to the Rule judges interests retrospectively after a statutorily defined waiting period.[30] Instead of prospectively examining and voiding the interest from the time of its creation, wait and see jurisdictions will not void an interest for violating the Rule unless an actual event or the actual nonoccurrence of an event prevents an interest from vesting within the statutorily defined waiting period (usually ninety years).[31]

In 1947, Pennsylvania became the first jurisdiction to adopt the wait and see modification to the Rule Against Perpetuities.[32] The statute lists as an exception to the common law Rule that "[u]pon the expiration of the period allowed by the common law rule against perpetuities as measured by *actual rather than possible events*, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void."[33] While the official comment to the 1947 statute claims that this exception was "intended to disturb the common law rule as little as possible,"[34] the Pennsylvania statute requires courts to examine the validity of future interests in a radically different way than is done under the common law Rule, which traditionally requires that possibilities be considered prospectively from the time of the interest's creation without reference to actual occurrences after the date of creation.[35]

The Pennsylvania statute typifies the broad wait and see legislation present in eight states.[36] The broad version of the wait

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30. *See* 5A POWELL, *supra* note 23, ¶ 827B[2].

31. This is in contrast to the method of analyzing interests under the traditional common law Rule Against Perpetuities, which commands that any possibility of an interest vesting too late be taken into account. *See id.*

32. *See* Leach, *supra* note 7, at 1128.

33. 20 PA. CONS. STAT. ANN. § 6104 (West, WESTLAW through 180th Reg. Sess. Act 1996-133 and through 1996 Sp. Sess. No. 2 Act 10) (emphasis added).

34. Commission's Report on Subsection (b), *reprinted in* 20 PA. CONS. STAT. ANN. § 6104 (West, WESTLAW through 180th Reg. Sess. Act 1996-133 and through 1996 Sp. Sess. No. 2 Act 10) (official comment).

35. *See* BERGIN & HASKELL, *supra* note 8, at 213-15.

36. The seven other states are: Iowa, Kentucky, Ohio, Rhode Island, Vermont, Virginia, and Washington. *See id.* at 213 n.6. *See* IOWA CODE ANN. § 558.68 (West, WESTLAW through 1995 Reg. Sess.); KY. REV. STAT. ANN. § 381.216 (Baldwin, WESTLAW through 1996 Reg. Sess.); OHIO REV. CODE ANN. § 2131.08(c) (Baldwin, WESTLAW through 1996

and see rule mandates that a court wait until the end of the perpetuities period, if necessary, to determine if the contingency to the vesting of an interest actually occurs.[37] A more limited form of the wait and see rule, often known as the "Massachusetts-style" rule,[38] "waits" only until the expiration of life estates possessed by individuals who were lives in being at the time of the transaction in question.[39] This limited form of the wait and see doctrine is used in two states.[40]

2. The Uniform Statutory Rule Against Perpetuities.—A variation on the wait-and-see modification is used by those states that have adopted the Uniform Statutory Rule Against Perpetuities.[41] In the Uniform Rule, a flat waiting period of ninety years is used as an alternative to lives in being plus twenty-one years.[42] The ninety year waiting period was intended to reasonably approximate the average period of time reached when measuring

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portion of 121st G.A. File 240); R.I. GEN. LAWS § 34-11-38 (WESTLAW through 1996 Reg. Sess.); VT. STAT. ANN., tit. 27, § 501 (WESTLAW through 1995 Reg. Sess.); VA. CODE ANN. § 55-13.3 (Michie, WESTLAW through 1996 Reg. Sess.); WASH. REV. CODE §§ 11.98.130, 11.98.900 (West, WESTLAW through 1996 Reg. Sess.).

37. *See* BERGIN & HASKELL, *supra* note 8, at 214.

38. *See, e.g.*, 6 AMERICAN LAW OF PROPERTY § 24.11, at 856 (Supp. 1977). The limited form is referred to as the Massachusetts rule because that state was the first to adopt it. Massachusetts, however, has since repealed the statute and adopted the Uniform Statutory Rule Against Perpetuities. *See* MASS. GEN. LAWS ANN. ch. 184A, §§ 1-11 (West, WESTLAW through 1996 2d Annual Sess. ch. 151).

39. *See* BERGIN & HASKELL, *supra* note 8, at 214.

40. *See id.* n.7. The two states with the more limited wait and see rule are Maine and Maryland. *See* ME. REV. STAT. ANN., tit. 33, § 101 (West, WESTLAW through through 1996 2d Sp. Sess.); MD. CODE ANN., EST. & TRUSTS § 11-103(a) (Michie, WESTLAW through 1996 Reg. Sess.).

41. The Uniform Statutory Rule Against Perpetuities has been adopted in twenty-four states. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES table of jurisdictions (amended 1990), 8B U.L.A. 41 (Supp. 1996). These states are: Alaska, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusettes, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, and West Virginia. *See id.*

42. The Uniform Rule provides the ninety year waiting period as an alternative to the traditional Rule. Only if an interest would be void under the tradtional Rule need one wait to see if it actually vests. The Uniform Rule provides:

(a) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

Unif. Statutory Rule Against Perpetuities § 1 (amended 1990), 8B U.L.A. 333 (1993). The Uniform Rule includes similiar provisions for powers of appointment. *See id.* § 1(b),(c), 8B U.L.A. at 333-34.

lives are used.[43] Under the Uniform Rule, courts wait until ninety years after the creation of an interest to see if contingencies to that interest's vesting occur.[44]

The Uniform Rule was intended to give interests that would otherwise be void under the traditional Rule a "second chance."[45] The two-step analysis of an interest under the Uniform Rule[46] adds to the traditional analysis of interests only to the extent that they are void under the traditional Rule. Thus, the Uniform Rule purports to require no modification to the drafting of interests previously held valid; if an interest was valid under the traditional Rule, it will still be valid under the Uniform Rule.[47]

3. Cy Pres.—The other major reform to the Rule Against Perpetuities is the *cy pres* doctrine, which allows courts to reform interests so as to avoid violating the Rule. The broad version of the *cy pres* doctrine provides for the equitable reformation of *any* transaction that would violate the Rule.[48] A more limited form of the *cy pres* doctrine addresses only invalid age contingencies, allowing courts to cut them down to twenty-one years, thus saving the interests.[49]

Certain states combine an unlimited *cy pres* provision with wait and see legislation.[50] Such a statute is typified by Vermont's legislation which states:

> Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest

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43. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES prefatory note (amended 1990), 8B U.L.A. 322, 327 (1993); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 158 (1988).

44. *See* Waggoner, *supra* note 43, at 157; UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), 8B U.L.A. at 333.

45. UNIF. STATUTORY RULE AGAINST PERPETUITIES prefatory note, 8B U.L.A. at 323.

46. *See id.* § 1(a), 8B U.L.A. at 333. One need not wait to see whether an interest vests only if it would otherwise be void under the traditional Rule. *See id.* § 1(a)(2).

47. *See id.* prefatory note, 8B U.L.A. at 329.

48. Such *cy pres* statutes have been adopted in Idaho, Iowa, Kentucky, Missouri, Ohio, Rhode Island, Vermont, and Washington. *See* BERGIN & HASKELL, *supra* note 8, at 218 n.14.

49. Connecticut, Illinois, Maine, Maryland, Massachusettes, and New York employ *cy pres* only to reduce excessive age contingencies to twenty-one years. *See id.* at 219 n.15.

50. These states are: Vermont, Ohio, and Kentucky. *See* 5A POWELL, *supra* note 23, ¶ 827C.

> would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.[51]

This type of statute has the effect of allowing liberal court intervention in the construction of a testator's wishes, both permitting the reformation of the language of the conveyance to satisfy the Rule and waiting to see whether contingencies are satisfied.

4. Other Reforms.—In addition to the wait and see and *cy pres* reforms to the Rule Against Perpetuities, some states have chosen to specifically address some of the presumptions made under the common law rule, specifically the presumption of fertility.[52] New York is such a state. The New York legislature has adopted rules of construction that specifically rebut the presumptions upon which the oft-criticized unborn widow,[53] slothful executor,[54] fertile octogenarian[55] and precocious toddler[56] cases are based.[57] Under New York law, a living person may introduce evidence regarding that person's ability to have a child.[58]

The Maryland General Assembly has enacted only limited modifications to the common law Rule Against Perpetuities. Four types of transactions are exempted from the common law Rule: (1) trusts providing for the perpetual care of a cemetery lot;[59] (2) transfers from charitable corporations subject to contingencies;[60] (3) trusts established by employers for the benefit of employees

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51. VT. STAT. ANN. tit. 27, § 501 (WESTLAW through 1995 Reg. Sess.).

52. *See supra* note 27.

53. *See* N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney, WESTLAW through L. 1996 ch. 599).

54. *See* N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (McKinney, WESTLAW through L. 1996 ch. 599).

55. *See* N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney, WESTLAW through L. 1996 ch. 599).

56. *See id.* The "precocious toddler" rule, a corolary of the fertile octogenarian rule, "conclusively presum[es] that a girl can have a child at the age of five." Leach, *The Nutshell Revisted*, *supra* note 5, at 992.

57. For a discussion of these cases, see Leach, *supra* note 19, at 731-34.

58. *See* N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(2) (McKinney, WESTLAW through L. 1996 ch. 599).

59. *See* MD. CODE ANN., EST. & TRUSTS § 11-102(a) (Michie, WESTLAW through 1996 Reg. Sess.).

60. *See* MD. CODE ANN., EST. & TRUSTS § 11-102(b) (Michie, WESTLAW through 1996 Reg. Sess.).

and beneficiaries of the employees;[61] and (4) trusts for charitable purposes.[62] Additionally, Maryland employs both the *cy pres* and wait and see doctrines to contingent remainders.[63] *Cy pres* may be used only to reduce the age contingency of a remainder interest following a life estate.[64] Maryland courts have been hesitant to adopt judicial exceptions to the common law rule absent legislative approval.[65]

III. Analysis

Because the Rule Against Perpetuities developed primarily to combat familial transfers of land that tended to keep property locked up within one family,[66] some writers have criticized the application of the Rule to arm's length commercial transactions. Such criticism has led to the carving out of exceptions to the Rule with respect to commercial transactions. Courts use two major approaches to avoid applying the Rule to commercial transactions or by which they save interests created by such transactions from violating the Rule.

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61. *See* MD. CODE ANN., EST. & TRUSTS § 11-102(c) (Michie, WESTLAW through 1996 Reg. Sess.).

62. *See* MD. CODE ANN., EST. & TRUSTS § 11-102(d) (Michie, WESTLAW through 1996 Reg. Sess.) (adopting the test for charitable purposes established by the Statute of Charitable Uses, 43 Eliz. ch. 4 (1601) (Eng.)).

63. *See* MD. CODE ANN., EST. & TRUSTS § 11-103 (Michie, WESTLAW through 1996 Reg. Sess.).

64. *See* MD. CODE ANN., EST. & TRUSTS § 11-103(b) (Michie, WESTLAW through 1996 Reg. Sess.).

65. *See* Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1144 (Md. 1988). The court cautioned that "[w]hen the legislature has expressly enumerated certain exceptions to a principle, courts normally should be reluctant thereafter to create additional exceptions," and reversed the lower court's exemption of rights of first refusal from the Rule Against Perpetuities. *Id.*

66. *See* BERGIN & HASKELL, *supra* note 8, at 178-80 (describing the rule as the primary means of combating "dead-hand" control of land and its roots in seventeenth-century England).

For an historical perspective on the social, political and economic forces which gave rise to rules designed to encourage the free alienability of land, see Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 261-81 (1995). There, the author asserts that rules encouraging the free alienability of land developed as "compromises between two competing impulses: The need to maintain a market in land satisfactory to meet rising levels of demand, on the one hand, and the desire of the gentry, on the other, to conserve their landholdings and pass them down intact to the next generation." *Id.* at 281.

A. Methods by Which Courts Have Attempted to Exempt Commercial Transactions from the Rule

To avoid having the Rule Against Perpetuities void commercial transactions, courts have taken various approaches to either hold the interests in question vested upon creation and thus exempt from the Rule's application or to imply a reasonable time for the satisfaction of the contingency to which the interest's vesting is subject.

Recently courts have merged principles of contract law with the Rule to create a presumption that, where the parties are otherwise silent, the satisfaction of a contingency affecting the vesting of an interest must occur within a reasonable time, which is held to be necessarily less than twenty-one years.

1. The Implication of a Reasonable Time for the Satisfaction of Conditions to the Vesting of Interests in Commercial Transactions.—The leading case supporting the implication of a reasonable time for the vesting of an interest in a commercial transaction is *Wong v. DiGrazia*.[67] In this case the California Supreme Court upheld under the Rule a lease to commence upon the completion of a shopping center.[68] In *Wong*, DiGrazia and Wong entered

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67. 386 P.2d 817 (Cal. 1963) (en banc).

68. Such "on-completion" leases are commonly executed between shopping center developers and prospective tenants. They are typically used by developers to secure in advance tenants for a contemplated shopping center. The term of the lease usually commences upon the completion of the shopping center's construction. Such leases have spawned litigation under the Rule. *See, e.g., In re* Wonderfair Stores, Inc., 511 F.2d 1206 (9th Cir. 1975) (shopping center lease); Omath Holding Co. v. City of New York, 545 N.Y.S.2d 557 (N.Y. App. Div. 1989) (lease to commence upon rezoning of property); City of Santa Cruz. v. MacGregor, 2 Cal. Rptr. 727 (Cal. Dist. Ct. App. 1960) (on completion lease). For a discussion on such agreements to lease in the future, see generally 3 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES §§ 34.1-.7, at 1571-1612 (3d ed. 1990).

Contracts for leases to commence in the future create what is known, in the traditional language of future interests, an *interesse termini*. The Maryland Court of Appeals described the *interesse termini* thus:

> Under the common law, until the lessee enters, he has no estate [in land], but only an *interesse termini*, a right to enter. *Interesse termini* applies to two situations, where the term stated in the lease has commenced but the lessee has not taken possession, and where there is a lease to take effect in the future . . . . Thus, one who is a lessee under a validly executed lease to commence in the future immediately becomes the owner of a future interest, a right of entry, which will ripen into a possessory estate when the term commences and when the lessee enters. The lessee acquires no possessory estate until the term commences and he enters upon the land.

into an agreement by the terms of which DiGrazia was to erect a building and lease it to Wong for a term of ten years.[69] The agreement between the parties required DiGrazia, the lessor, to complete the building within ninety days after a building permit was issued by San Francisco.[70] Wong's lease was not to commence until the building was completed.[71]

In holding that the agreement between the parties required construction of the building to be completed within a reasonable time, the California Supreme Court reviewed cases that dealt with such leases[72] in addition to scholarly works on the Rule. The court concluded that the rigid application of the Rule to such an on-completion lease was inappropriate:

> The rule against perpetuities originated as a rule of property law during the mercantilistic period of English history. . . . The social order of 1682 demanded as to its property transactions certainty in title and fixation of ownership; the idea of titles which had not vested or ownership which remained

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Arthur Treacher's Fish & Chips, Inc. v. Chillum Terrace Ltd. Partnership, 327 A.2d 282, 287 (Md. 1974) (citation omitted). Note, however, that the term *interesse termini* can have a different meaning, depending upon whether it is used to refer to a tenant under a present lease who has not yet entered the land or a grantee of an interest in a lease to commence in the future who cannot yet enter the land. *See* 1 TIFFANY, THE LAW OF REAL PROPERTY § 86, at 133 (3d ed. 1939 & Supp. 1995).

69. *See Wong*, 386 P.2d at 819-20.

70. *See id.* at 820. The pertinent provisions of the agreement between the parties provided:

> "Lessor (defendants) shall forthwith commence the construction of a building upon the herein demised premises, in accordance with plans and specifications . . . . Construction shall commence forthwith upon approval of completed plans and specifications and shall continue expeditiously until said buildings [sic] is completed, subject to material and/or labor shortages, strikes, lockouts, governmental actions and all causes beyond control of lessor. Said building shall be completed within ninety (90) days after a building permit has been secured from the City and County of San Francisco of said plans and specifications, subject to the contingencies above mentioned . . . . Upon completion of said building . . . Lessor shall forthwith cause a Notice of Completion to be recorded, and the term of this lease shall commence upon the recording of said Notice of Completion."

Id. (quoting paragraph 27 of the parties' agreement).

71. *See id.*

72. The court cited with approval the results reached in several similar cases but disagreed with their reasoning. *See* Isen v. Giant Food, Inc. 295 F.2d 136 (D.C. App. 1961); City of Santa Cruz v. MacGregor, 2 Cal. Rptr. 727 (Cal. Dist. Ct. App. 1960); Halifax v. Vaughn Constr. Co., 9 D.L.R.2d 431 (N.S. 1957) (Can.). The court expressly disagreed with two other cases that voided on-completion leases under the Rule: Southern Airways Co. v. De Kalb County, 115 S.E.2d 602 (Ga. 1960); Haggerty v. City of Oakland, 326 P.2d 957 (Cal. Dist. Ct. App. 1958).

> inchoate was necessarily anathema. Indeed, the basic purpose of the rule was to limit family dispositions, and in that context the period of lives in being plus 21 years served as a proper measurement. Only later by an overextension of nineteenth century concepts did the courts apply the rule to commercial transactions.
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> . . . .
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> . . . Surely the courts do not seek to invalidate bona fide transactions by the imported application of esoteric legalisms. Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected . . . . We therefore do not propose to apply the rule in the rigid or remorseless manner characterized by some past decisions; instead we shall seek to interpret it reasonably, in the light of its objectives and the economic conditions of modern society.[73]

The court rejected the idea of construing the lease as creating a presently vested future interest to escape the Rule's application,[74] calling such a method a "contrived technicality."[75]

In holding that a reasonable time could be implied for the satisfaction of the contingencies[76] to the commencement of the lease, the court explicitly rejected the reasoning adopted by an earlier California court, which had refused to so imply a reasonable time.[77] This opinion was criticized by the *Wong* court as failing to recognize that the courts have "evolved exceptions to the rule."[78]

A corollary to the *Wong* court's holding was its refusal to base its analysis of the lease under the Rule on the assumption that one of the parties would violate an obligation under the agreement while the other party would leave such a breach unremedied.[79] The court hypothesized that under such reasoning even a specific

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73. *Wong*, 386 P.2d at 823 (citations and footnote omitted).

74. Such a means of interpretation has been used by other courts effectively to exempt commercial transactions from the Rule's application. *See, e.g., Isen*, 295 F.2d 136; *In re Wonderfair Stores*, 511 F.2d 1206. For a discussion of such a method, see *infra* Part III.A.2.

75. *Wong*, 386 P.2d at 824.

76. The court found that four contingencies affected the commencement of Wong's lease: (1) the construction of the building itself; (2) the approval of the plans; (3) the exceptions contained in the agreement's *force majore* clause; and (4) the issuance of the building permit for the construction. *See id.*

77. *See id.* at 825 (disapproving the holding of Haggerty v. City of Oakland, 326 P.2d 957 (Cal. Dist. Ct. App. 1958)).

78. *Id.*

79. *See id.* at 826 (specifically referring to the obligation of DiGrazia to commence construction expeditiously).

provision in the lease requiring the commencement date to occur within twenty-one years could possibly be violated by the parties, just as their duty to complete construction in a reasonable time could be violated.[80] The court concluded: "we are not willing to predicate a transgression of the rule [against perpetuities] on the theory that agreements must be presumed to be broken and parties unwilling to enforce their rights."[81]

The *Wong* decision has been followed by courts in other jurisdictions both with respect to leases to commence in the future[82] and other interests. Using the theory that a reasonable time may be implied for the satisfaction of contingencies to the vesting of an interest, courts have saved from the Rule[83] preemptive rights,[84] options[85] and contingent sales contracts.[86] Some courts have extended this line of reasoning from commercial transactions to purely donative transfers,[87] although many of the

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80. *See Wong*, 386 P.2d at 826.

81. *Id.*

82. *See, e.g.*, Singer Co. v. Makad, Inc., 518 P.2d 493 (Kan. 1974). The Kansas Supreme Court held it reasonable to assume that in the "hurried, competitive atmosphere of today's commercial world" sophisticated businessmen "would not contemplate entering into a lease arrangement contingent on events which might not transpire until twenty-one years had gone by." *Id.* at 499.

83. It is important to distinguish between an interest which is held to *not violate* the Rule, *see* cases cited in notes 74-77 *infra*, and interests that are *exempt* from the Rule—hence the use of the phrase "saved from the Rule." While some courts have declared interests created by commercial transactions exempt from the Rule, their decision to do so is of doubtful wisdom as is discussed *infra* Part III.A.2.

84. *See* Wildenstein & Co. v. Wallis, 595 N.E.2d 828 (N.Y. 1992); Metropolitan Transp. Auth. v. Bruken Realty Corp., 536 A.2d 814 (N.Y. 1986) (refusing to apply New York's statutory Rule, N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney, WESTLAW through L. 1996 ch. 599), to preemptive rights in "commercial and governmental transaction[s]" where giving effect to the rights would serve the public interest).

85. Courts have saved from violation of the Rule both options appurtenant to a transfer of land, *see, e.g.*, Peterson v. Tremain, 621 N.E.2d 385 (Mass. App. Ct. 1993); Yentile v. Howland, 525 N.E.2d 689 (Mass. App. Ct. 1988); Ryland Group, Inc. v. Wills, 331 S.E.2d 399 (Va. 1985), and options in gross. *See* Pathmark Stores, Inc. v. 3821 Assocs., Inc., 663 A.2d 1189 (Del. Ch. 1995). *But see* Symphony Space Inc. v. Pergola Properties, Inc., 669 N.E.2d 799, 804-05 (N.Y. 1996) (refusing to exempt options created in commercial transactions from the Rule absent legislative amendment of New York's stautory rule against perpetuities). Courts have also implied a reasonable time with respect to options appurtenant to gas and oil leases. *See* El Paso Prod. Co. v. P.W.G. Partnership, 566 P.2d 311 (N.M. 1993) (saving the option by both implying a reasonable time and using the "wait and see" approach mandated under New Mexico and Texas law).

86. *See* Read v. G.H.D.C., Inc., 334 S.E.2d 165 (Ga. 1985).

87. *See, e.g.*, Young v. Cass, 340 S.E.2d 185 (Ga. 1986).

policy reasons for saving transactions from the Rule disappear outside the commercial context.

Courts that refuse to read a reasonable time into commercial transactions creating a future interest generally rely upon the policies of the Rule itself as outweighing the benefits of the commercial transactions lauded by the jurisdictions that exempt them from being voided under the Rule. Often the determination of the benefits of the transaction is dependent upon the nature of the interest in question. For instance, in *Pace v. Culpepper*,[88] a Mississippi court struck down as void under the Rule an option to purchase land created appurtenant to a commercial conveyance of land.[89] The court reasoned that option contracts that have the potential of vesting too late should not be upheld because

> such [options] take property out of commerce and prevent land from answering to the needs of growing communities. No improvements can be made on land so encumbered because the land always remains subject to being taken under the option. It is not a matter which affects the rights of individuals only, but the welfare of the public is at stake.[90]

Other courts, however, merely apply the common law Rule without regard to competing policies to declare interests void.[91]

2. Jurisdictions that exempt from the Rule's application interests created in commercial transactions by holding that such interests are vested upon their creation.—Another way in which jurisdictions uphold commercial transactions that would violate the common law Rule Against Perpetuities is to hold that the interest in question is vested upon creation and, therefore, exempt from the Rule's application. Such a method is a less desirable alternative to the implication of a reasonable time because it is done without regard to the competing policies of the Rule and the commercial transactions that are upheld. Absent such an analysis of competing interests, nothing in the opinions of those courts limits the application of the holding to just commercial transactions. Thus, courts that hold interests as vested upon creation to exempt a commercial transaction may be creating precedent that may be

88. 347 So. 2d 1313 (Miss. 1977).
89. *See id.* at 1318.
90. *Id.*
91. *See, e.g.*, Southern Airways Co. v. De Kalb County, 115 S.E.2d 207 (Ga. 1960).

used to exempt interests created by the very donative transfers against which the Rule was designed to guard.

The ninth circuit held in part that a shopping center lease, the term of which was to commence upon completion of a shopping center, conveyed a present interest to the lessee in the land underlying the shopping center to be built.[92] The court construed the present tense language of the agreement between the parties, the right of entry prior to completion given to the prospective tenant, and the inclusion of covenants running with the land as indicating the intent of the parties to transfer some present interest to the lessee, not merely an interest to commence in the future.[93]

This method of treating commercial transactions under the Rule is of questionable merit. By misreading years of common law precedent, courts hold interests to be vested upon creation for the purpose of exempting a commercial transaction from the Rule. However, when the policy reasons for so exempting a transaction do not exist, as in the case of a donative, familial conveyance or demise, jurisdictions are left with precedent that cannot be distinguished, yet can serve to defeat the very purposes of the Rule.

B. Maryland's Hybrid Approach to the Implication of a Reasonable Time in Commercial Transactions

Maryland courts, in a recent line of cases,[94] have seemingly joined other jurisdictions following *Wong* by implying a reasonable time for the satisfaction of conditions precedent to the vesting of an interest, but with the distinction that such an implication is made only when the condition is controlled by a party to the instrument creating the interest.[95]

In *Dorado Limited Partnership v. Broadneck Development Corp.*,[96] the Maryland Court of Appeals iterated what has become Maryland's test for whether a reasonable time, less than the perpetuities period, will be implied for the fulfillment of a condition

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92. *See In re* Wonderfair Stores, Inc., 511 F.2d 1206 (9th Cir. 1975).

93. *See id.* at 1211 (distinguishing the case of Target Stores, Inc. v. Twin Plaza Co., 153 N.W.2d 832 (Minn. 1967), as basing its holding on contract language more strongly suggesting the parties' intent that no lease or rights would exist until the completion of the shopping center).

94. *See* Dorado Ltd. Partnership v. Broadneck Dev. Corp., 562 A.2d 757 (Md. 1989); Stewart v. Tuli, 573 A.2d 109 (Md. Ct. Spec. App. 1990); Hays v. Coe, 595 A.2d 484 (Md. Ct. Spec. App. 1990), *vacated on other grounds*, 614 A.2d 576 (Md. 1992).

95. *See* Wong v. DiGrazia, 386 P.2d 817 (Cal. 1963) (en banc).

96. 562 A.2d 757 (Md. 1989).

precedent to save an interest from violating the Rule Against Perpetuities. *Dorado* limits such an implication to conditions precedent controlled by a party to the instrument creating the interest.[97] Where third parties control the fulfillment of the condition, a reasonable time will not be implied and an interest that may possibly vest later than the perpetuities period will still violate the Rule.[98]

In *Dorado*, on June 23, 1981, Dorado Limited Partnership and Broadneck Development Corporation entered into a real estate sales contract.[99] In addition to agreeing to sell a certain number of lots to Dorado, Broadneck also granted to Dorado an option to purchase additional lots.[100] After the settlement of certain lots, the contract of sale was amended[101] and the amendment, which was the subject of the Court of Appeal's decision, provided as follows:

> 1. Buyer agrees to purchase and settle on all remaining lots covered by the Contract of Sale by payment of the purchase price in cash not later than ninety (90) days after the Seller has delivered to Buyer evidence of sewer allocations of such lots. Time is of the essence of all the provisions of the Contract of Sale.[102]

Under the terms of the agreement between Dorado and Broadneck, the actual purchase of the lots could not occur until after Broadneck obtained a sewer allocation for the lots covered by the option. During the period of the transaction, Anne Arundel County was experiencing a moratorium on sewer allocations, so it was impossible for Broadneck to procure the necessary sewer allocations to proceed with sale.[103]

In concluding that the Option Agreement violated the Rule Against Perpetuities, the *Dorado* court reasoned:

> We agree with the Supreme Court of Virginia that where the occurrence of the condition precedent to a conveyance is beyond the control of the parties, a reasonable time for perfor-

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97. *See id.* at 762.

98. *See id.*; Stewart v. Tuli, 573 A.2d 109 (Md. Ct. Spec. App. 1990); Hays v. Coe, 595 A.2d 484 (Md. Ct. Spec. App. 1991), *vacated on other grounds*, 614 A.2d 576 (Md. 1992).

99. *See Dorado*, 562 A.2d at 758.

100. *See id.*

101. *See id.*

102. *Id.*

103. *See id.*

> mance, less than the perpetuities period, cannot be implied. This position is in accord with our decision in *Commonwealth v. Bowers* . . . .
>
> In this case, Broadneck has fulfilled its obligation under the contract. It has applied for a sewer allocation. Settlement is dependent, not on performance by Broadneck, but on the action of a third party, Anne Arundel County. Whether Anne Arundel County might grant a sewer allocation is unknown.
>
> We conclude, therefore, that the contract for the sale of the remaining lots is unenforceable because it violates the Rule Against Perpetuities.[104]

One subsequent decision by the Maryland Court of Special Appeals, Maryland's intermediate appellate court, applied the *Dorado* rule. In *Stewart v. Tuli*,[105] Stewart entered into a contract for the purchase of land owned by Novak. The same land had been the subject of a previous sales agreement to Tuli, which was allegedly declared void by Novak and Tuli.[106] Because the Stewart contract called for Novak to deliver clear title to the land, the question of applicability of the Rule Against Perpetuities arose respecting whether Tuli's continued claim to the land was a contingency to the transfer of the land to Stewart that might cause Stewart's interest in the land to vest too remotely. By holding that the contract required Novak to transfer clear title to Stewart within a reasonable time and thus satisfied the Rule Against Perpetuities,[107] the Court of Special Appeals fleshed out the corollary to the *Dorado* court's refusal to so imply a reasonable time when neither party controlled the contingency.[108] Although the contract provided that Novak's action to clear title "must be taken promptly,"[109] the Court of Special Appeals explained in a later case that such language was not essential to its holding and

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104. *Dorado*, 562 A.2d at 762 (referring to the Virginia case of Ryland Group, Inc. v. Wills, 331 S.E.2d 399, 403 (Va. 1985)).

105. 573 A.2d 109 (Md. Ct. Spec. App. 1990).

106. *See id.* at 110.

107. *See id.* at 114.

108. Although the court stated that "the condition precedent to conveyance is *judicial determination* of the validity of the Tuli contract," *id.* at 112 (emphasis added), it appears that the court, in distinguishing this case from the holding of *Dorado*, treated the condition as controlled by Novak and thus subject to the implication of a reasonable time for satisfaction.

109. *Id.* at 113.

suggested that it would have held similarly absent such language.[110]

Read together, Maryland's *Dorado* and *Tuli* decisions demonstrate the fine line that is drawn between cases in which a reasonable time will be implied and those in which it will not. In *Dorado*, the sales transaction was voided because the contingency affecting the conveyance was controlled by a municipal board; in *Tuli* a transaction was upheld even though the contingency affecting its conveyance was to be determined by the judiciary. With such a gray line between two opposite results, it would appear to be left up to the skill of advocates in litigation to characterize the party who controls the contingency. Consider, for example, a land sales contract settlement which is contingent upon the securing of rezoning for the property to be sold. Such a contract could be interpreted as either imposing upon the seller the duty to secure rezoning of the property or as leaving the matter up to the decision of the local zoning board. However, this variation in interpretation would determine whether the contract violated the Rule Against Perpetuities under the *Dorado* rule.[111]

The *Dorado* court predicated much of its reasoning on the case of *United Virginia Bank v. Union Oil Co.*,[112] in which the Virginia Supreme Court originally stated a test similar to that adopted in *Dorado*. There the court held that an option that became effective upon the completion of a proposed highway could not be saved by the implication of a reasonable time for the commencement of the option period.[113] Citing factual distinctions between *Union Oil* and an earlier federal case, the court refused to extend the reasoning of *Isen v. Giant Food*,[114] a case applying Virginia law that did imply a reasonable time to the facts before it.[115] The Virginia court held that the intent of the parties to the option agreement was irrelevant, because neither party could "bring about

110. *See* Hays v. Coe, 595 A.2d 484 (Md. Ct. Spec. App. 1991), *vacated on other grounds*, 614 A.2d 576 (Md. 1992).

111. An option contingent upon such an arrangement was held to violate the Rule Against Perpetuities in Commonwealth Realty v. Bowers, 274 A.2d 353 (Md. 1971).

112. 197 S.E.2d 174 (Va. 1973).

113. *See id.*

114. 295 F.2d 136 (D.C. Cir. 1961).

115. *See United Va. Bank*, 197 S.E.2d at 177. Presumably the factual distinction between the cases centered on whether the party in control of the contingency was a party to the contract creating the interest in question. *See id.*

occurrence of the agreed contingency,"[116] namely, the construction of the proposed highway.

The concern implied by the *Dorado* court that contingencies controlled by entities not party to the transaction creating the interest could cause the interest to vest too late would be adequately addressed by adoption of the *Wong* rule. Under the *Wong* analysis, the failure of a third party to satisfy such a contingency would amount to frustration of contract, which would allow a party to the transaction creating the interest to seek rescission of the contract.[117] While it is conceivable that a party to the transaction might possibly take longer than twenty-one years to enforce its rights under the contract creating the interest, to so predicate a violation of the Rule Against Perpetuities is disfavored, both in Maryland, and in other jurisdictions.[118]

Finally, the transactions that Maryland purports to exempt from the rule in *Dorado* serve socially useful functions. Commercial transactions involving future interests in land encourage the development of property and, because of the fast-paced nature of the commercial world, are not likely to tie up land for long periods of time, the problem that the Rule was designed to prevent. There is nothing inherent in the control of a contingency by parties to the contract creating a future interest that so distinguishes commercial transactions in a way that would exempt socially useful commercial transactions, while leaving others subject to the Rule. Rather, Maryland's hybrid approach cuts a wide swath across both socially useful commercial transactions and those likely to result in interests that vest too late.

Although the exceptions created by various courts to save interests that would otherwise violate the Rule Against Perpetuities would be unnecessary had the drafters of the interests in question contemplated the Rule's applicability and inserted a savings clause to avoid the Rule,[119] the fact that exceptions have been crafted to the Rule, both judicially and by statute, evidences the intent of both the courts and legislatures to forgive violations of the Rule so

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116. *Id.*

117. *See Wong*, 386 P.2d at 827-28 (citing the doctrine of commercial frustration as explained in Lloyd v. Murphy, 153 P.2d 47, 53 (Cal. 1944)).

118. *See, e.g., id.* at 826 (refusing to predicate a violation of the Rule on the assumption that parties will break their promises and leave their rights unenforced).

119. Leach noted that he had not encountered any case in which an interest could not have been saved from the Rule by careful drafting. *See* Leach, *supra* note 19, at 723.

as to effectuate the intent of the parties to the instruments creating future interests. While parties can certainly have no expectation that courts will look leniently on poorly written transactions, and can thus not expect that interests created without contemplation of the Rule will necessarily be saved by an indulgent court, society values commercial transactions and places on them a certain degree of reliance. It is this expectancy that is sacrificed under Maryland's arbitrary distinction between interests it chooses to save under the *Dorado* rule and those it does not.

IV. Conclusion

Various approaches exist by which courts in other jurisdictions address the problem of commercial transactions under the Rule Against Perpetuities. Jurisdictions such as California, and those states which have followed the *Wong* decision, have made the choice to value the commercial transactions saved by the implication of a reasonable time over the technicalities of the Rule Against Perpetuities. Maryland's exception serves only to introduce yet another technicality into an already complicated area of the law. The *Wong* approach to commercial transactions under the Rule is clearly preferable to Maryland's. It adequately addresses the concerns ostensibly voiced by the Maryland Court of Appeals in *Dorado* and would allow commercial transactions to take place unfettered by the Rule. By adopting the *Wong* reasoning, Maryland would join a majority of other jurisdictions that have removed from at least one area of realty transactions the hypertechhnicalities of a Rule ill-suited to the modern commercial world.

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